

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1667

SIERRA CLUB, THOMAS
GREENHALGH, SAVE THE
MANATEE CLUB, SILVER SPRINGS
ALLIANCE, RAINBOW RIVER
CONSERVATION, OUR SANTA FE
RIVER, ICHETUCKNEE ALLIANCE,
and JIM TATUM,

Appellants,

v.

DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
GINNIE SPRINGS OUTDOORS,
LLC, PAUL STILL, and FRIENDS
OF WEKIVA RIVER, INC.,

Appellees.

On appeal from the Florida Department of Environmental
Protection.

Noah Valenstein, Secretary.

February 15, 2023

B.L. THOMAS, J.

Appellants seek review of four final orders of the Department
of Environmental Protection establishing Basin Management

Action Plans (“BMAPs”) covering fifteen Outstanding Florida Springs. On appeal, Appellants raise four issues. We write to address only the second issue, on which we reverse the final order.

In 1999, the Legislature adopted the Watershed Restoration Act, requiring the Department to

coordinate with local governments, water management districts, the Department of Agriculture and Consumer Services, local soil and water conservation districts, environmental groups, regulated interests, other appropriate state agencies, and affected pollution sources in developing and executing the total maximum daily load program.

Ch. 99-223, § 3, Laws of Fla.; § 403.067(1), Fla. Stat. In adopting the Act, the Legislature found that developing the total maximum daily load (“TMDL”) program “will promote improvements in water quality throughout the state through the coordinated control of point and nonpoint sources of pollution.” *Id.* The Legislature found that “[t]he scientifically based [TMDL] program is necessary to fairly and equitably allocate pollution loads to both nonpoint and point sources.” *Id.*

Section 403.031(21), Florida Statutes (2018), defines a TMDL as

the sum of the individual wasteload allocations for point sources and the load allocations for nonpoint sources and natural background. Prior to determining individual wasteload allocations and load allocations, the maximum amount of a pollutant that a water body or water segment can assimilate from all sources without exceeding water quality standards must first be calculated.

“Wasteload allocations are pollutant loads attributable to existing and future point sources, such as discharges from industry and sewage facilities. Load allocations are pollutant loads attributable to existing and future nonpoint sources and natural background.” Fla. S. Comm. on Ways & Means, CS for SB 444 (2005) Staff Analysis (Apr. 29, 2005). Section 403.067(6)(a)2., Florida Statutes (2018), further explains the requirements for TMDLs:

The total maximum daily load calculation shall establish the amount of a pollutant that a water body or water body segment may receive from all sources without exceeding water quality standards, and shall account for seasonal variations and include a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. The total maximum daily load may be based on a pollutant load reduction goal developed by a water management district, provided that such pollutant load reduction goal is promulgated by the department in accordance with the procedural and substantive requirements of this subsection.

TMDLs must be adopted by rule. § 403.067(6)(c), Fla. Stat.

In 2005, the Legislature created section 403.067(7), Florida Statutes, authorizing the Department to develop Basin Management Action Plans (“BMAPs”) to “equitably allocate . . . pollutant reductions to individual basins, as a whole to all basins, or to each identified point source or category of nonpoint sources, as appropriate.” Ch. 2005-166, § 6, Laws of Fla.; § 403.067(7)(a)2., Fla. Stat. A BMAP “must integrate the appropriate management strategies available to the state through existing water quality protection programs to achieve the total maximum daily loads and may provide for phased implementation of these management strategies to promote timely, cost-effective actions . . .” § 403.067(7)(a)1., Fla. Stat.

In 2005, the Legislature also amended section 403.067(6)(b), Florida Statutes to provide:

Allocation of total maximum daily loads. The total maximum daily loads shall include establishment of reasonable and equitable allocations of the total maximum daily load between or among point and nonpoint sources that will alone, or in conjunction with other management and restoration activities, provide for the attainment of the pollutant reductions established pursuant to paragraph (a) to achieve water quality

standards for the pollutant causing impairment. The allocations may establish the maximum amount of the water pollutant that may be discharged or released into the water body or water body segment in combination with other discharges or releases. Allocations may also be made to individual basins and sources or as a whole to all basins and sources or categories of sources of inflow to the water body or water body segments. *An initial allocation of allowable pollutant loads among point and nonpoint sources may be developed as part of the total maximum daily load. However, in such cases, the detailed allocation to specific point sources and specific categories of nonpoint sources shall be established in the basin management action plan pursuant to subsection (7).*

(emphasis added); Ch. 2005-166, § 6, Laws of Fla. The Act, as amended, contemplates that, where the level of a pollutant exceeds the maximum allowable load, TMDLs and BMAPs may set allocations of the required pollutant load *reduction* for each source or category of source to reduce its loading to an allowable maximum daily load.

In 2016, finding that “action is urgently needed” to protect Florida springs, *see* section 373.801(4), Florida Statutes, the Legislature enacted the Florida Springs and Aquifer Protection Act (“Springs Act”), requiring the Department to comprehensively plan, coordinate, and implement actions for the protection and restoration of Outstanding Florida Springs. Ch. 2016-1, § 23, Laws of Fla. The Springs Act required the Department to adopt BMAPs for impaired Outstanding Florida Springs. § 373.807(1), Fla. Stat. Section 373.807(1)(b) sets forth items that these BMAPs for impaired Outstanding Florida Springs “must include, at a minimum,” including:

7. Identification of each point source or category of nonpoint sources, including, but not limited to, urban turf fertilizer, sports turf fertilizer, agricultural fertilizer, onsite sewage treatment and disposal systems, wastewater treatment facilities, animal wastes, and stormwater facilities. An estimated allocation of the

pollutant load must be provided for each point source or category of nonpoint sources.

Appellants challenged the BMAPs for certain Outstanding Florida Springs concerning the pollutant nitrogen, which the Department assessed in the form of nitrate. Among other claims, Appellants argued that the Department failed to comply with sections 403.067(6)(b) and 373.807(1)(b) in creating the BMAPs. Appellants argued that the TMDLs that the Department had previously adopted for the Outstanding Florida Springs at issue included an “initial allocation of allowable pollutant loads among point and nonpoint sources,” as described in section 403.067(6)(b), Florida Statutes, such that the BMAPs were required to include a “detailed allocation to specific point sources and specific categories of nonpoint sources” pursuant to that subsection.

Each TMDL rule for the Outstanding Florida Springs at issue in this appeal identified a target concentration of nitrate and allocated the load to four broad categories: wasteload allocations (“WLAs”) to NPDES permitted point-source discharges,* WLAs to NPDES permitted municipal separate storm sewer discharges, load allocations (“LAs”) to nonpoint sources, and a margin of safety. *See Fla. Admin. Code R. 62-304.410(1), 62-304.500(20), 62-304.640(1), and 62-304.505(15)*. For example, the TMDL established for the Santa Fe River in Florida Administrative Code Rule 62-304.410(1) provides:

Santa Fe River TMDLs. Santa Fe River TMDL for nutrient and dissolved oxygen impairments: The TMDL for nutrients in the Santa Fe River (below river rise) is to achieve a monthly average of 0.35 mg/L nitrate-nitrite, and is allocated as follows:

* The National Pollutant Discharge Elimination System (NPDES) is a permit program that regulates certain pollutant discharges. *See § 403.0885, Fla. Stat.* No NPDES permitted wastewater point-source discharges exist in the Outstanding Florida Springs basins at issue, so there were no WLAs made to this category in the TMDL rules for these basins.

(a) The WLA for wastewater point sources is not applicable;

(b) The WLA for discharges subject to the Department's NPDES MS4 Permitting Program is to meet a monthly average in-stream ambient water quality target of 0.35 mg/L nitrate-nitrite. The range of reduction necessary to achieve the LA is estimated between 13 and 35% depending on the month and location within the basin. Achievement of the TMDL constitutes meeting the water quality target; and

(c) The LA for nonpoint sources is to meet a monthly average of 0.35 mg/L nitrate-nitrite. The range of percent reduction necessary to achieve the LA is estimated between 13 and 35% depending on the month and location within the basin. Achievement of the TMDL constitutes meeting the water quality target.

The Santa Fe River Basin BMAP set the following nitrogen reduction schedule for the entire basin:

Table 10. Nitrogen reduction schedule (lb-N/yr)

5-Year Milestone (30% of Total)	10-Year Milestone (50% of Total)	15-Year Milestone (20% of Total)	Total Nitrogen Reduction (100%)
556,012	926,686	370,674	1,853,372

Div. of Env't Assessment & Restoration, Dep't of Env't Prot., Santa Fe River Basin Management Action Plan (2018), at 33-34. The Department set forth similar schedules in the BMAPs for the other Outstanding Florida Springs at issue. These schedules did not include allocations of pollutant reductions to specific point sources or specific categories of nonpoint sources.

Appellants argued that in the BMAPs at issue, the Department was required to provide detailed allocations of pollutant load reductions to specific categories of nonpoint sources.

The Department contended that the BMAPs complied with the requirements of sections 403.067(6)(b) and 403.067(7)(a) because the BMAPs included allocations “to the basin as a whole” and that pie charts included in the BMAPs sufficed to provide the “estimated allocation of the pollutant load . . . for each point source or category of nonpoint sources” required by section 373.807(1)(b)7., Florida Statutes.

The Administrative Law Judge’s recommended order found that while the previously adopted TMDL rules for the Outstanding Florida Springs at issue “established reasonable and equitable allocations of the TMDL between point versus nonpoint types of sources of pollution,” they “did not establish an initial allocation of allowable pollutant loads among point and nonpoint sources” such that the requirement of a detailed allocation in the BMAPs was triggered. The recommended order noted that the TMDL rules do not require any reduction to any particular point source or any specific category of nonpoint source. The recommended order also found that the pie charts in each BMAP showing “current sources and current load estimates to groundwater” from various sources were sufficient to satisfy the requirements of section 373.807(1)(b).

Appellants filed exceptions to the recommended order, including an exception to the recommended order’s conclusion that the TMDL rules were not “initial allocations” under section 403.067(6)(b) and that the Department was therefore not required to include “detailed allocations” in the BMAPs. The final order denied this exception and adopted the Administrative Law Judge’s interpretation, finding that to the extent that the Administrative Law Judge’s finding was a conclusion of law, Appellants’ interpretation was not more reasonable than that of the Administrative Law Judge. The final order also stated that the exception had to be rejected because Appellants did not allege that the recommended order’s finding was not supported by competent, substantial evidence and an agency need not rule on an exception that does not identify the legal basis for the exception. *See* § 120.57(1)(k), Fla. Stat. The final order also denied Appellants’ exception to the Administrative Law Judge’s conclusion that the pie charts showing current nitrogen load estimates satisfied the requirements of section 373.807(1)(b). This appeal follows.

Preservation

On appeal, the Department contends that Appellants did not properly preserve their argument that the Department was required to make “detailed allocations” in the BMAPs because the recommended order’s determination that the TMDL rules did not include “initial allocations” under section 403.067(6)(b), Florida Statutes, was a finding of fact and Appellants did not argue in their exception that this finding was not supported by competent, substantial evidence.

This Court looks to the substance of the decision in an administrative order to determine whether the decision was a conclusion of law or a finding of fact. *See J.J. Taylor Co. v. Dep’t of Bus. & Pro. Regul., Div. of Alcoholic Beverages & Tobacco*, 724 So.2d 192, 193 (Fla. 1st DCA 1999). If a paragraph in a recommended order substantially addresses matters of fact, then this Court treats it as a finding of fact, not a conclusion of law. *Kanter Real Est., LLC v. Dep’t of Env’t Prot.*, 267 So. 3d 483, 488–89 (Fla. 1st DCA 2019) (holding that a paragraph in a recommended order was a finding of fact because every sentence in the paragraph was a factual finding).

The recommended order’s discussion of this issue primarily addresses the TMDL rules. While the recommended order appears to use the rules as items of evidence rather than guidelines, the order attempted to address Appellants’ legal argument concerning the interpretation and application of section 403.067(6)(b). Thus, the recommended order’s resolution of the issue is a conclusion of law, and Appellants’ exception preserved this issue.

Interpretation of sections 403.067(6)(b) and 373.807(1)(b)

The Court reviews an administrative agency’s interpretation of a statute de novo. Art. V, § 21, Fla. Const. There is no separate provision of statute defining “initial allocation” and “detailed allocation” as referenced in section 403.067(6)(b), Florida Statutes (2018). However, a reading of all provisions of section 403.067(6)(b) supports Appellants’ argument. *See Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003) (“It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the

statute if possible, and words in a statute should not be construed as mere surplusage.” (citation omitted)).

The first full sentence of section 403.067(b) requires a TMDL to establish “reasonable and equitable allocations of the total maximum daily load between or among point and nonpoint sources” The final sentences qualify this requirement by providing that “[a]n initial allocation of allowable pollutant loads among point and nonpoint sources may be developed as part of the total maximum daily load,” but in such cases, a “detailed allocation to specific point sources and specific categories of nonpoint sources” must then be made in the subsequently developed BMAP. Read together, these provisions require that the Department develop TMDL rules allocating each TMDL “between or among point and nonpoint sources” and that if only an initial allocation “among point and nonpoint sources” is made, the subsequent BMAP must make a “detailed allocation” among “*specific* point sources and *specific categories* of nonpoint sources.” § 403.067(b), Fla. Stat. (emphasis added). Thus, section 403.067(b) contemplates TMDL rules with either initial allocations to point and nonpoint sources broadly or detailed allocations to specific point sources and categories of nonpoint sources. If only an initial, broad allocation is included in the TMDL, the BMAP must include a more detailed allocation.

Here, in order to meet a certain level of nitrate, the TMDL rules for the Outstanding Florida Springs at issue allocated nitrate reductions to four broad categories: wastewater point sources, municipal separate storm sewer discharge point sources, nonpoint sources, and a margin of safety. Because there were no “*specific categories* of nonpoint sources” included in the TMDL rules, the rules included only an “initial allocation,” and section 403.067(b) required the Department to include a “detailed allocation to specific point sources and specific categories of nonpoint sources” in the BMAP for each Outstanding Florida Springs at issue.

The Department argues that it complied with the requirements of section 373.807(1)(b)7., Florida Statutes (2018), by including in the BMAPs results from the Department’s Nitrogen Source Inventory Loading Tool for each springshed depicted as pie charts showing the current nitrogen loading

estimates to groundwater by source. For example, the Santa Fe River BMAP included the following pie chart estimating current nitrogen loading in the Devil's Complex Springshed:

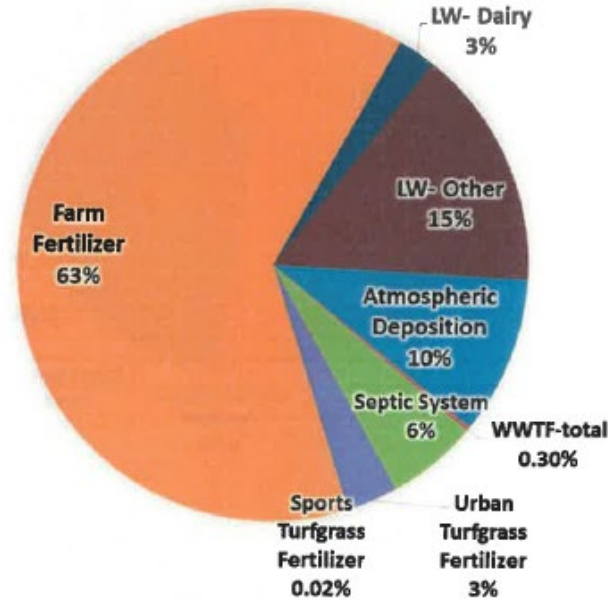


Figure 2. Loading to groundwater by source in the Devil's Complex Springshed

Div. of Env't Assessment & Restoration, Dep't of Env't Prot., Santa Fe River Basin Management Action Plan (2018), at 31.

Section 373.807(1)(b)7. requires that BMAPs for Outstanding Florida Springs include an “[i]dentification of each point source or category of nonpoint sources” The BMAPs for Outstanding Florida Springs must also include “[a]n estimated allocation of the pollutant load . . . for each point source or category of nonpoint sources.” § 373.807(1)(b)7., Fla. Stat. However, the pie charts included in the BMAPs only show *current* estimated nitrogen loading in the various springsheds by source. There is no “allocation of the pollutant load” as required by section 373.807(1)(b)7., or put another way, allocation of the necessary load reductions to meet the TMDL. *See also* § 403.067(7)(a)2., Fla. Stat. (“A basin management action plan must equitably allocate . . . pollutant *reductions* to individual basins, as a whole to all basins, or to each identified point source or category of nonpoint sources, as appropriate.” (emphasis added)).

The Department’s allocations of load reductions in the BMAPs at issue allocated the reductions to the entire basins, not to any point or nonpoint source. The Department argued below that sections 403.067(6)(b) and 403.067(7), Florida Statutes (2018), only require allocations to the basin as a whole. Appellants have addressed this argument on appeal, although the Department did not specifically address it in its answer brief.

Section 403.067(6)(b) provides that for TMDLs, “[a]llocations may also be made to individual basins and sources *or as a whole to all basins and sources* or categories of sources *of inflow to the water body or water body segments.*” (emphasis added). Appellants persuasively argue that, if this clause applies at all to this issue, it only establishes that allocations to basins as a whole may be appropriate only for basins that are “sources of inflow to the waterbody” that is the subject of the TMDL. There are no such basins at issue here. In any event, as explained below, we need not reach the issue of how specifically to interpret this provision because this case deals specifically with BMAPs for Outstanding Florida Springs.

The Department also relies on the provision of section 403.067(7)(a)2., which states that “[a] basin management action plan must equitably allocate . . . pollutant reductions to individual basins, as a whole to all basins, or to each identified point source or category of nonpoint sources, *as appropriate.*” (emphasis added). In this case, however, allocations of a load reductions to a basin as a whole are clearly not “appropriate,” because, as discussed above, section 373.807(1)(b)7. requires that BMAPs for Outstanding Florida Springs include “[a]n estimated allocation of the pollutant load . . . for *each* point source or *category* of nonpoint sources.” (emphasis added).

For the reasons explained above, we reverse the Department’s final order and remand for further proceedings consistent with this opinion.

ROBERTS and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

John Ross Thomas, Law Office of John R. Thomas, P.A., St. Petersburg, Douglas H. MacLaughlin, West Palm Beach, and Anne Michelle Harvey, Save the Manatee Club, Maitland, for Appellants.

Justin Wolfe, General Counsel, Florida Department of Environmental Protection, Tallahassee, and Jeffrey Brown, Kenneth Hayman, and Carson Zimmer, Office of General Counsel, Florida Department of Environmental Protection, Tallahassee, for Appellees.